

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ORLAN CHARLES HORNE,

Plaintiff(s),

vs.

ANDRES N. BERTOTTO S.A.I.C., et al.,

Defendant(s).

Case No. 2:14-cv-00389-APG-NJK

ORDER DENYING MOTION FOR  
 PROTECTIVE ORDER AND  
 COUNTER-MOTION FOR  
 SANCTIONS

(Docket Nos. 23, 24)

Pending before the Court is Defendant Andres Bertotto S.A.I.C.'s motion for a protective order. Docket No. 23. Plaintiff filed a response in opposition. Docket No. 24. Defendant failed to file a reply. Also before the Court is Plaintiff's counter-motion for sanctions. Docket No. 24. Defendant failed to file a response in opposition. For the reasons discussed below, the motion for protective order is hereby **DENIED** without prejudice and the counter-motion for sanctions is also **DENIED** without prejudice.

This is the second time this motion for protective order has come before the Court. The first time it did so, the Court noted, *inter alia*, that:

the grounds on which the motion is based do not appear sufficiently developed. The primary contention in the motion is that an "apex" deposition is not proper in this case, but counsel for Defendant Andres Bertotto S.A.I.C. does not even know what position Sergio Andres Bertotto holds *with DEFENDANT*. See Docket No. 21 at 3 ("The relationship to BERTOTTO S.A.I.C. of the deponents is unclear. It is likely that SERGIO ANDRES BERTOTTO is a board member and CEO. However, their specific employment relationship is unknown").

Docket No. 22 at 2 n.1. That deficiency remains, as local counsel for Defendant assert that they will not know the position Sergio Andres Bertotto holds with Defendant until Defendant answers Plaintiff's

discovery requests. *See* Docket No. 23 at 3. This is ridiculous. The time for obtaining basic information from counsel's own client is *prior* to the filing of the motion. *Cf.* Rule 11(b) (requiring reasonable inquiry prior to filing).<sup>1 2</sup>

Moreover, the other arguments in the moving papers are presented in cursory fashion. For example, Defendant argues that holding the depositions would require significant expense, without any meaningful elaboration. *See* Docket No. 23 at 6. Such boilerplate assertions are insufficient. *Cf. Jackson v. Montgomery Ward & Co.*, 173 F.R.D. 524, 529 (D. Nev. 1997) (to prevail on an argument for undue burden, the party seeking to avoid discovery must "allege specific facts which indicate the nature and extent of the burden, usually by affidavit or other reliable evidence"). Similarly, Defendant argues that Plaintiff may obtain the information through other, more convenient means without any meaningful elaboration. *See* Docket No. 23 at 6.<sup>3</sup>

Notwithstanding the deficiencies in Defendant's motion, however, the Court in its discretion will not deny it outright at this time. In particular, Defendant states that the depositions at issue were set as a means to pressure it into settling this case. *See* Docket No. 23 at 6. Without citation, Plaintiff appears to admit that the depositions are being used as a vehicle to pressure settlement, stating that "[t]he aggressive pursuit of discovery in order to 'push the settlement' is indeed a legitimate purpose of discovery." Docket No. 24 at 3. This is troubling to the Court. While Plaintiff confidently makes that pronouncement, he provides no citation to any legal authority that discovery may be used to pressure

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<sup>1</sup> The Court finds unpersuasive local counsel's assertion that they don't know what position Mr. Bertotto holds exactly, but they are confident it is a position for which the "apex" doctrine applies. *See* Docket No. 23-1 at ¶ 8. Counsel must obtain basic information from their client prior to filing the motion and the Court will not rely on such speculation.

<sup>2</sup> The motion focuses primarily on Andres Bertotto. Very little attention is provided with respect to the other deponents. Once again, however, counsel has filed moving papers without basic knowledge as to those deponents. *See* Docket No. 23 at 6 ("for Domingo Bertotto and Leticia Bertotto . . . we do not know their specific role if any with the Defendant").

<sup>3</sup> Nor did Defendant respond to Plaintiff's assertion that Defendant has failed to timely respond to written discovery that has been propounded. *See* Docket No. 24 at 7. That failure to rebut that argument in a reply brief can be deemed a waiver on the issue. *See, e.g., Maciel v. Cate*, 731 F.3d 928, 932 n.4 (9th Cir. 2013).

1 settlement. *See id.* Moreover, the Supreme Court has expressed concern in allowing discovery to be  
2 used as a tool to unfairly pressure settlement. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-  
3 559 (2007).

4 In short, neither party has sufficiently developed their positions to enable the Court to resolve  
5 the motion for protective order or the counter-motion for sanctions. Both motions are hereby DENIED  
6 without prejudice.<sup>4</sup> The Court will provide the parties one last opportunity to sufficiently brief their  
7 motions.<sup>5</sup> To the extent Defendant continues to seek a protective order, it must file a motion for  
8 protective order no later than October 28, 2014. That motion must be supported by specific facts  
9 properly submitted to the Court, as well as appropriate legal citation. Any renewed motion without  
10 sufficient factual support (*e.g.*, a declaration attesting to the deponents' positions with Defendant) will  
11 be denied outright. Plaintiff's response and any counter-motion must be filed no later than November  
12 4, 2014. Plaintiff's response and any counter-motion must be supported by sufficient facts, as well as  
13 citation to case authority showing that it is proper to notice depositions of foreign nationals for the  
14 purpose of pressuring settlement. Defendant shall file any reply and, if a counter-motion is filed, any  
15 response no later than November 10, 2014. Any reply to the counter-motion shall be filed no later than  
16 November 14, 2014. The Court hereby CAUTIONS Defendant that the failure to respond to any  
17 argument through a reply can be construed as forfeiting responsive arguments and that the failure to  
18 respond to a counter-motion may be deemed consent to the granting of the counter-motion.

19 IT IS SO ORDERED.

20 DATED: October 21, 2014

21   
22 NANCY J. KOPPE  
United States Magistrate Judge

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24 <sup>4</sup> Although the Court does not rule definitively on the counter-motion for sanctions, the Court  
25 notes that Plaintiff argues that sanctions are appropriate for non-appearance at a deposition when "[n]o  
26 protective order [is] in place." *See* Docket No. 24 at 8. That argument is plainly wrong. *See* Fed. R.  
Civ. P. 37(d)(2) (a failure to attend a deposition can be excused where the "party failing to act has a  
pending motion for a protective order" (emphasis added)).

27 <sup>5</sup> Of course, counsel is encouraged to confer to attempt to resolve the issue without further Court  
28 involvement.